LOOI MENG LEONG

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CRIMINAL APPEAL NO. 61 OF 1984; 51-212-87; 51-230-87; 51-330-87]
6 SEPTEMBER 1990

CRIMINAL PROCEDURE: *Summary trials by Magistrates - Order which should be made if prosecution case not proved - Discharge not amounting to acquittal.*

EVIDENCE: *Tendering of document by defence before prosecution starts - Saving time - Irregularity covered under Criminal Procedure Code s. 422.*

INSURANCE: *Traffic offences - Whether conviction for traffic offences results in automatic conviction for offence of there not being a policy of insurance on foot - Interests of third parties - Avoidance provisions in policies - Protection by legislation - Road Transport Act 1987, ss. 90, 95, 96.*

ROAD TRAFFIC: *Traffic offences - Whether conviction for traffic offences results in automatic conviction for offence of there not being a policy of insurance on foot - Interests of third parties - Avoidance provisions in policies - Protection by legislation - Sections 90, 95 and 96 Road Transport Act 1987.*

This case discusses the principles regarding convictions for road traffic offences and offence of using a motor vehicle without there being a policy of insurance in force (insurance offence) under s. 90 of the Road Traffic Ordinance. In essence it deals with whether any conviction for a traffic offence relating to licencing laws of drivers of motor vehicle results in automatic conviction for the insurance offence under review. Reference is made both to the Road Traffic Ordinance 1958 (the Ordinance) and the Road Transport Act 1987 (the Act). The protection afforded to third parties by ss. 79 and 80 of the Ordinance and now embodied in ss. 95 and 96 of the Act is also discussed.

This judgment deals with 3 appeals for traffic and insurance offences from decisions of learned Magistrates in Perak. All 3 appellants were charged under various sections of the Ordinance and were also simultaneously charged with insurance offences.

Held:

[1] From a study of the Ordinance, the Act and other relevant laws, it has become impossible, since 1958, to prosecute successfully for the insurance offence when there is in existence a third party insurance policy by the car owner.

[2] Nowhere has it ever been stated in the Ordinance or the Act by way of presumption or otherwise, that a *prima facie* case or conviction for any traffic offence or any other offence in respect of licensing or any other offence either in the said Ordinance or the Act would result in the "automatic" *prima facie* case or conviction for the insurance offence unless explained by the defendant; an insurance offence would have to be proved beyond a reasonable doubt should the traffic prosecutor decide really so to prosecute.

[3] (a) At common law, an injured third party had no direct recourse to an insurer of a tortfeasor. Our Parliament, following the English example, has intervened by introducing road traffic legislation by making certain conditions in a motor vehicle

insurance policy void and of no effect against the injured third party against whom the repudiation of liability to indemnify the tortfeasor has no effect - see ss. 95 and 96 of the Act.

(b) Section 96 of the Act is a catch-all provision against insurers which was enacted for the purpose of protecting third parties.

(c) When there is an insurance policy on foot at the time of the traffic offence, any presumed breach of condition as stated by the insurer in the policy would be void against an injured third party; the policy would therefore be in force and there would not be a breach of s. 90 of the Act.

[4] Under s. 173 of the Criminal Procedure Code (the Code) which deals with summary trials by Magistrates, it behoves a Magistrate to proceed to hear evidence to the conclusion of the prosecution case before he can order an acquittal and discharge after finding that no case has been made out which if unrebutted, would warrant a conviction. The correct order would be an order of discharge not amounting to acquittal instead of an order of acquittal and discharge.

[5] Although the fact of a defendant tendering a document in evidence before the prosecution case begins is slightly irregular, it is a practice that saves time; further s. 422 of the Code makes provision for the admission of such evidence.

[Conviction in appeal No. 1 set aside, orders of acquittal and discharge in appeals no. 2 and 3 substituted with orders of discharge not amounting to acquittal.]

Cases referred to:
Josephine Yui Chui Leng v. PP [1973] 2 MLJ 47
Malaysia National Insurance Sdn. Bhd. v. Abdul Aziz bin Mohd Daud [1979] 2 MLJ 29
PP v. Lim Ching Chuan [1972] 1 MLJ 27

Legislation referred to:
Criminal Procedure Code, ss. 173(g), 422
Road Traffic Ordinance 1958, ss. 22, 14(1)(a), 74(1), 75(1), 79, 80(4)
Road Transport Act 1987, ss. 79, 80, 90, 95, 96
Road Traffic Act 1972 [UK], s. 148(1)

Other source referred to:
Halsbury's Laws of England, Vol. 25 p. 394

For the deputy public prosecutor - Mohd Zaki bin Mohd Yassin
For the applicant in Perak Criminal Appeal No. 61/1984 - S.A. Lingam
For the other parties - not represented.

JUDGMENT

Peh Swee Chin J:

In these three appeals from decisions of learned Magistrates in Perak, I have made the necessary orders thereon and indicated I would give my grounds of judgment in writing later, and now here I do.

This written judgment was predicated by the conflicting decisions relating to convictions or orders of acquittal as the case may be, pursuant to s. 74(1) of the former Road Traffic Ordinance 1958 (hereafter called the Ordinance) (now replaced by Road Transport Act 1987) i.e. the offence of using or causing or permitting any other person to use a motor vehicle without there being in force in relation to the user of the motor vehicle etc. Such a policy of

insurance as complies with the requirements of the ordinance. The said s. 74(1) is now s. 90 of the Road Transport Act, (hereafter called the Act). The requirements to be complied with are of course well known to all in connection with third party risks.

The conflicting decisions aforesaid came as no surprise to me, and were most probably caused by the plethora of similar cases reported in the Malayan Law Journal which do not always appear to be consistent with one another.

It would be necessary to set out my views or what appears to be relevant principles regarding the offence set out above, (hereafter called the insurance offence).

First and the foremost, it is undoubtedly fallacious to assume that any conviction for a traffic offence relating to licensing laws of drivers or motor vehicles involves automatic conviction for the insurance offence under review. On the contrary, from a study of the Ordinance, the Act, and other relevant laws, it has become well-nigh impossible for quite sometime (since 1958, the year of the Ordinance) to hope to prosecute successfully for the insurance offence, any owner of any private car or any driver permitted by him, when there is "third party" insurance policy taken out in respect of the car by the owner at all material times in the standard form or any form. I think it will be unnecessary to explain what a "third party" insurance policy is.

Whether or not there is, at any given time a policy of insurance in force as complies with the law, i.e. a policy in respect of statutory compulsory insurable risks against third party, is a mixed question of law and fact, I dare say, by no means uncomplicated at first sight, but it is certainly not any legal fiction and should not be one, for a conviction for the insurance office entails also the rather serious mandatory disqualification from holding or applying for any driving licence for period of 12 months. A conviction should really be grounded on the real non-existence of the appropriate insurance policy. Nowhere has it ever been stated in the Ordinance or the Act by way of presumption or otherwise, that a *prima facie* case or conviction for any traffic offence or any other offence in respect of licensing or any other offence either in the said Ordinance or the Act would result in an "automatic" *prima facie* case or conviction for the insurance offence unless explained by the defendant. The only reason for the traffic prosecutor to prosecute any driver for the insurance offence at the same time as that other offence under the Ordinance or Act, even if after an insurance policy in respect has been inspected by him beforehand, must have been the vague idea entertained by him that a condition or conditions of the policy of insurance must have been breached leaving the insurers at liberty to cancel the policy and immune from the claims of the unfortunate injured third party. How else could he have been prosecuting any driver for such insurance offence? He would not care to find out that almost all, conditions of the kind set out in those insurance policies have been made void by the provisions of the Ordinance and the Act against the third party who would be able to recover the judgment sums for damages for negligence against the insurers; and on this, more later.

At the risk of some repetition, it would be an unacceptable legal fiction to pursue the concept of an "automatic" conviction following a conviction for other traffic offence. Such assumption and "automatic" conviction would greatly imperil the interests of justice, and could even result in loss of personal liberty in some cases.

I am of the view that an insurance offence would have to be proved beyond a reasonable doubt should the traffic prosecutor decide really to so prosecute. Such proof would involve some study of relevant provisions of the Ordinance or Act, some insurance law and insurance policy in question and almost all policies are in standard forms.

Thus, Tan Chiaw Tong J found it necessary on hearing an appeal from a Magistrate's Court in *Josephine Yui Chui Leng v. PP* [1973] 2 MLJ 47, to take fresh evidence from a representative of the insurer in question at that appellate stage to determine if the policy covered third party risks. In the event that had turned out, there, his Lordships found that the policy did so.

Raja Azlan Shah FJ, as he then was, had occasion in the Federal Court in *Malaysia National Insurance Sdn. Bhd. v. Abdul Aziz bin Mohd Daud* [1979] 2 MLJ 29, 32 to consider *Josephine's* case, stating that his Lordships did not find it necessary or appropriate to disagree with the factual basis of the decision in Josephine. His Lordship said:

> In that case the insurance company considered itself on risk on the date of the alleged offence and that must have been one of the material factors which the learned Judge took into account in arriving at his conclusion. If an insurance company had told the Court that it considered itself on risk, the mischief at which the Road Traffic Ordinance is aimed did not arise, for, if an accident had taken place, it would have indemnified the assured so that the injured person would recover the money.

At common law, an injured third party has no direct recourse to an insurer of a tortfeasor. An insurer sometimes is in the habit of repudiating liability to indemnify the tortfeasor at the drop of a hat.

Parliament, in England, intervened and has been intervening ever since by road traffic legislation by making certain conditions in a motor vehicle insurance policy void and of no effect against the injured third party against whom the repudiation of liability to indemnify the tortfeasor has no effect. Our own Parliament has also followed suit.

At first, conditions in a policy requiring the insured driver to do something or not to do something in connection with the accident, were made void against any third party, though still of consequence to the policy holder.

Later a further group of conditions was made void by s. 79 of the Ordinance (now s. 95 of the Act). It is set out below for convenience:

> 79. Avoidance of Restrictions on Scope of Third Party Risks Policies.
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> Where a certificate of insurance has been delivered under subsection (4) of s. 75 of this Ordinance to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters:
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> (a) the age or physical or mental condition of persons driving the motor vehicle; or
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> (b) the condition of the motor vehicle; or
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> (c) the number of persons that the motor vehicle carries; or
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> (d) the weight or physical characteristics of the goods that the motor vehicle carries; or
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> (e) the times at which or the area within which the motor vehicle is used; or
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> (f) the horse-power or value of the motor vehicle; or
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> (g) the carriage on the motor vehicle of any particular apparatus; or
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> (h) the carriage on the motor vehicle of any particular means of identification other than any means of identification required to be carried by or under Part II of this Ordinance; or
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> (i) the driver of the motor vehicle at the time of the accident being under the influence of intoxicating liquor or of a drug; or

(j) the driver of the motor vehicle at the time of the accident not holding a licence to drive or not holding a licence to drive the particular motor vehicle; or

(k) the motor vehicle being used for a purpose other than the purpose stated in the policy;

shall, as respects such liabilities as are required to be covered by a policy under para. (b) of subsection (1) of s. 75 of this Ordinance, be of no effect:

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person.

Ordinarily, an insurer for the breach of any of the conditions in a policy touching also on and concerning the matters enumerated in s. 79 aforesaid would have been, entitled, as a matter of law of contract, to terminate the policy for breach, and a third party, would have lost all the protection which the policy was meant to provide, but for the s. 79. Then by s. 80 of the Ordinance it was made clear that on a judgment being entered against an insured driver; ...any condition in the policy which entitled the insurer or had entitled the insurer to avoid or cancel the policy (on account of breach of condition committed by the insured driver,) should not relieve the insurer from paying the said judgment. This s. 80 of the Ordinance has been re-enacted now as s. 96 of the Act, word for word. The said s. 80 is set out below:

80. Duty of Insurers to Satisfy Judgments Against Persons Insured in Respect of Third Party Risks.

(1) If, after a certificate of insurance has been delivered under subsection (4) of s. 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (b) of subsection (1) of s. 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

(2) No sum shall be payable by an insurer under the foregoing provisions of this section:

(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had notice of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either:

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part of this Ordinance in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under the foregoing provisions of this section if, in an action commenced before or within three months after the commencement of the proceedings in which the judgment was given, he has obtained a declaration that apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from the provisions of this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person.

(5) In this section the expression "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and if so at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the terms of the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(6) In this Part of this Ordinance reference to a certificate of insurance in any provisions relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy.

The seemingly unassailable judgment, of course, is itself expressly subject to a number of qualifications and conditions as set out in s. 80 and to quote but one example, such as the qualification that insurer must have notice of the civil proceedings in which the judgment was obtained either before or within 7 days of the commencement of the said civil proceedings.

The conditions and qualifications do not normally concern the traffic prosecutor and are practically outside his province in the nature of things.

The relationship between s. 79 and s. 80 of the Ordinance (i.e. ss. 95 and 96 of the Act) would appear to be a bit curious and obscure. Was s. 80, judging by its wording, an enactment to plug any other loopholes left by any inadvertent omission in s. 79 so that the third party would be fully protected? Or was it merely something else?

The avoiding section, i.e. s. 79 of the Act has corresponding section in England's Road Traffic Act 1972, i.e. their s. 148(1) but our s. 79 would appear to have more categories of the conditions or matters than the English section. At p. 394 of Vol. 25, *Halsbury's Laws of England*, commenting to the effect that in a certain situation, even the provision rendering the conditions described in the avoiding section void against the third party was found to be insufficient to protect the interests of third parties, it says in this connection: "A more drastic provision was accordingly enacted which imposes upon the insurers ... the obligation to pay to any person entitled to the benefit of judgment ... notwithstanding that the insurers may be entitled to avoid or cancel or may have avoided or cancelled the policy." Section 149(1) of Road Traffic Act of England, (*in pari materia* with our s. 80 of Act) is of course the "more drastic provision" referred to above. This would seem to indicate that our s. 80 of the Act was meant to be a catch - all against the insurers for the purpose of protecting the third parties. I agree with the suggestion from the passage cited above.

I now deal with the said three criminal appeals one by one. First, in Perak Criminal Appeal No. 61/84, aforesaid, the driver was charged with first, driving a motor vehicle with an expired road tax licence under s. 22 of the Ordinance and secondly with the insurance offence. He pleaded guilty to both charges according to the learned Magistrate at Kampar and was convicted, duly fined, and disqualified from holding or obtaining a driving licence for one year mandatorily in connection with the insurance offence. In short, the learned Magistrate appeared to adopt the view that a conviction for the insurance offence followed automatically the conviction of driving with an expired road tax licence despite the tender of the insurance policy to the Court.

The insurance policy did on its face cover the use of the car against third party risks on the date of the alleged offence. The relevant condition in the policy would seem to be in the form of the *proviso* contained in all private car policies, i.e.

> provided that the person driving is permitted in accordance with the licensing laws or regulations to drive the motor vehicle...

and this must have been presumed by the learned Magistrate to have been breached. Though expired road tax licence was not a matter in s. 79 of the Ordinance, (i.e. s. 95 of the Act), it was nonetheless a matter of no consequence to the third party for by s. 80, notwithstanding the insurer could avoid the policy, the insurer would have to pay a judgment obtained by the third party as explained above.

Such being the case the policy was really therefore in force against such third party risks. In any event, in the case of *PP v. Lim Ching Chuan* [1972] 1 MLJ 27, on similar facts, the conviction and sentence in respect of the insurance offence were set aside and if the learned Magistrate had followed that case, she would not have also convicted the driver of the insurance offence. In view of the plea of guilt, I could not entertain the appeal against conviction for the insurance offence, but in exercising my revisionary powers, I set aside the conviction, fine and the order for disqualification for 12 months, the said order for disqualification having been stayed earlier pending appeal. I also ordered the fine to be refunded.

The second appeal, was Perak Criminal Appeal No. 51-212-87, in which the defendant was charged with first the offence of carrying a passenger on his motor cycle when he was merely the holder of a provisional driving licence under reg. 16(b) L.N. 172/59 and punishable under s. 14(1)(a) of the Ordinance and secondly with the insurance offence under s. 74(1) of the Ordinance. The defendant pleaded guilty to the 1st charge. On the 2nd charge under s. 74(1)

the defendant produced for inspection of the learned Ipoh Magistrate who found the policy was in force at the material time and proceeded to acquit and discharge the defendant without taking further evidence. The public prosecutor appealed on the ground that the learned Magistrate had erred in holding that defendant was not guilty of the insurance offence and also on the ground that the learned Magistrate was wrong in acquitting and discharging the defendant without hearing the evidence of the prosecution case.

Since the wording of the similar proviso set out above in conjunction with the facts of this appeal was wide enough to give rise to a similar breach of condition that could be inferred from the proviso, for the same reasons, given earlier, such presumed breach of condition would also be void against an injured third party and the policy was therefore in force.

The learned Magistrate in this case therefore had not erred in holding that by virtue of the insurance policy produced to her for inspection, the defendant was not guilty of the offence under s. 74(1).

What she has erred however was to have ordered the acquittal and discharge of the driver without proceeding to trial, or alternatively, without ordering a discharge not amounting to acquittal on the ground that the charge in respect of the insurance offence, was groundless as the defendant had a valid insurance policy in force as complied with the law, with such ground as stated above being recorded in writing.

Under s. 173 of the Criminal Procedure Code, dealing with summary trials by Magistrates, it behaves a Magistrate to proceed to hear evidence to the conclusion of the prosecution case before he can order an acquittal and discharge after finding that no case has been made out which if unrebutted would warrant a conviction, but there is one exception i.e. s. 173(g) which provides in connection with what has been just stated that the Magistrate can discharge the accused at any previous stage of the case, if for reasons to be recorded by the Magistrate, it considers the charge to be groundless. This would necessarily mean that all the necessary facts which the prosecution has adduced or would be adducing would not make out the offence.

I therefore made the order of setting aside the said order of acquittal and discharge and substituting therefore an order of discharge not amounting to acquittal on the ground as stated, leaving it to the discretion of the prosecution to start afresh if it really so wished.

The 3rd appeal, i.e. Criminal Appeal No. 51-330-87 was in respect of defendant who was charged first for driving a goods vehicle without having a vocational licence in force, an offence under s. 133(1) of the Ordinance and secondly for the insurance offence. The defendant pleaded guilty to the first charge only and in respect of the 2nd charge he produced an insurance policy for the inspection of the Court. In mitigation the defendant pleaded that he had a licence (presumably not of the vocational type) and insurance policy. The learned Magistrate in this case convicted him of the 1st charge and acquitted and discharged him of the 2nd charge. The learned Deputy appealed on the ground to the effect that a conviction under s. 74(1) should follow a conviction of the 1st charge. The learned Magistrate was right in her view that the defendant was not guilty by virtue of the insurance policy which she inspected but for the same reasons given by me above, she should have ordered a discharge not amounting to acquittal. I set aside the order of acquittal and discharge and substituted therefore an order of discharge not amounting to an acquittal. In any event, s. 79 of the Ordinance (s. 95 of the Act) made any condition requiring a driver to hold a driving licence a particular motor vehicle void against the third party.

I think I ought to express my view about a defendant facing a charge in connection with the insurance offence producing the relevant insurance policy for inspection of the Court before prosecution evidence even starts. It is only slightly irregular in that a defendant is in fact tendering a document in evidence before the defence case begins. It is on the other hand a practice that will save everybody's precious time. Should anybody, on appeal, complain of this as being improper admission of evidence or in other ways an irregularity the Court will not hesitate to resort to s. 422 of the Criminal Procedure Code which states:

> Section 422. Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account:
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> of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceeding under this Code; or
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> of the want of any sanction required by s. 129; or
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> of the omission to settle or revise any list of jurors or assessors; or
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> of the want of qualification of any juror or assessor, or
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> of the improper admission or rejection of any evidence; or
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> of any misdirection in any charge to jurors or assessors;
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> unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection has occasioned a failure of justice.

I ought to mention further the "MIB agreement" made between the Minister of Transport and Motor Insurer's Bureau and the further "Domestic Agreement" familiar to the motor insurance industry and their legal advisers; I think it is not necessary for the Court to refer to them except to say they are designed to further plug any more loopholes in an injured third party's statutory rights, notably for example to provide compensation, subject to observance of certain procedure, even for victims of untraced or unknown drivers. The agreements are extra statutory and seem to have preempted further legislative intervention in regard to s. 79 and s. 80 of the Ordinance (which have been reenacted in the Act as s. 95 and s. 96) without any amendment.

Also found at [1991] 1 CLJ 355